2004

State of Utah v. Scot Ken Scuderi : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. SCOT KEN SCUDERI, Defendant/Appellant.	Case No. 20020936-CA

REPLY BRIEF OF APPELLANT

APEAL FROM THE THIRD DISTRICT JUDICIAL COURT, SALT LAKE COUNTY, STATE OF UTAH, FROM A CONVICTION OF POSSESSION OF CLANDESTINE LABORATORY PRECURSORS AND/OR EQUIPMENT, A FIRST DEGREE FELONY, BEFORE THE HONORABLE ROBIN W. REESE

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ARGUMENT

I. SCUDERI'S CONVICTION MUST BE REVERSED BECAUSE THE STATE FAILED TO BRING HIM TO TRIAL WITHIN THE 120-DAY PERIOD

A. Scuderi's Motion to Dismiss preserved this issue for appeal.

The State first claims that Scuderi's pro se motion to dismiss was not preserved for appeal. However, Utah Code Annotated § 77-29-1(4) specifically states that the trial court is to "review the proceeding" once the "defendant or his counsel moves to dismiss the action" if the trial "court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause." The Utah Supreme Court has consistently held that § 77-29-1 grants the trial court discretion for reviewing whether the speedy trial statute has been violated, and thus, a trial court's failure to review the proceeding is reviewed for an abuse of discretion. *State v. Coleman*, 2001 UT App 281, ¶ 3, 34 P.3d 790; *State v. Trujillo*, 656 P.2d 403, 405 (Utah 1982).

Scuderi preserved this issue for appeal by filing pro se a motion to dismiss (R. 289-90). Therefore, the State's assertion that Scuderi has failed to argue plain error is irrelevant (Br. of Appellee at 5-6).

Scuderi's motion to dismiss was preserved for appeal purposes, as he repeatedly reminded the trial court of his 120-day disposition and filed pro se a motion to dismiss (See Addenda in Br. of Appellant). Thus, Scuderi's motion "put[] the judge on notice of the asserted error" and certainly raised the trial court's "consciousness" of its mistake, thereby giving the trial court an opportunity to correct its error. *State v Davis*, 2004 UT 63, ¶ 13, __ P.3d __.

The State also claims "defendant never moved to dismiss the case, so the trial court never made a good cause determination pursuant to a motion to dismiss" (Br. of Appellee at 14). Although Scuderi's motion to dismiss was not in the usual form trial courts are accustomed to, he placed on the title of his letter to the trial court "Motion to dismiss 120-Day Disp." and specifically stated, "I would like to submit to the court this request as a motion and hope the court will recognize this as such...." (R. 290). Therefore, Scuderi asserts that his letter was a proper motion before the trial court. Accordingly, the State's claim that the reason for the trial court's failure to consider the motion to dismiss is not supported by the record.

B. The trial was not brought within the 120-day disposition period.

Next, the State contends that the entire 17 month period in which the State failed to bring Scuderi to trial is supported by good cause delay, thereby tolling the statutory

120-day period (Br. of Appellee at 17). However, the record clearly indicates that this approximate 500-day delay was not entirely the result of "good cause shown in open court." *See* Utah Code Annotated § 77-29-1(3).

1. The Detainer Period Expired April 12, 2001.

First, the State asserts that it is irrelevant that Scuderi did not waive his 120-day disposition during the February 9, 2001 hearing because his attorney requested a continuance (Br. of Appellee at 18). The State relies on § 77-29-1(3), which states "the defendant or his counsel ... may be granted any reasonable continuance." However, the State's argument is unsound.

At the hearing, Scuderi's trial counsel requested a continuance (R. 351 at 3). However, Scuderi told the trial court that he would not consent to a further continuance of his trial (R. 351 at 4-5). The trial court ignored Scuderi's objection and ordered a continuance anyway. The State argues that trial counsel has authority to override his client's decisions concerning the objectives of representation. Moreover, the State asserts it was permissible for the trial court to ignore Scuderi's objection and instead continue the trial at the request of his trial counsel, even though Scuderi expressed in open court that he did not want his trial counsel to continue the trial date.

Utah law clearly holds that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation...." Utah Rules of Professional Conduct, Rule 1.2. Moreover, the comment to Rule 1.2 states, "The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law...." Additionally, a lawyer has a duty of loyalty to his client which "is so essential to

the proper functioning of the judicial system that its faithful discharge is mandated not only by the Rules of Professional Conduct, but also, in criminal cases, by the Sixth Amendment right of a criminal defendant to the effective assistance of counsel. *State v. Holland*, 876 P.2d 357, 359 (Utah 1994).

In this case, it is evident that Scuderi's trial counsel ignored his decision to not continue the trial date any further. Thus, trial counsel breached the duty of loyalty he owed Scuderi and violated the Utah Rules of Professional Conduct. Accordingly, the trial court also erred in continuing the trial date without Scuderi's approval. Therefore, this delay, caused by the trial court's error, was not "good cause" for extending the trial date beyond the 120-day disposition period. Thus, the convictions must be dismissed with prejudice because the prosecutor failed to have the case tried within the allotted time.

2. The August 30, 2001 Continuance Was Not Supported by Good Cause

Next, the State argues that the additional "continuance of the trial beyond August 30, 2001 was the result of a decision by defense counsel and the court" and thus fits under the good cause exception (Br. of Appellee at 19). Further, the State argues "the delay was caused by defense counsel's decision to withdraw" (Br. of Appellee at 21). However, the continuance was not at the request of trial counsel and it was error for the trial court to order substitute counsel because there was no conflict. Therefore, this continuance was not the result of "good cause" and accordingly, went well beyond the 120-day disposition period.

The record clearly indicates that the trial court continued the trial date due to a supposed conflict of interest with LDA (R. 331 at 17-18). Moreover, as the State admits. the trial court suggested that LDA withdraw from representing Scuderi (R. 331 at 15; Br. of Appellee at 20). Thus, trial counsel withdrew only after the trial court requested his withdrawal; trial counsel did not withdraw on his on initiative as the State suggests. Moreover, there clearly was no conflict of interest between LDA and Scuderi and the trial court erred in continuing the trial date way beyond the 120-day disposition period.

The State asserted on August 16, 2001 that a conflict of interest existed that required LDA to withdraw from representing Scuderi (R. 325 at 46). Not only did trial counsel vigorously deny that a conflict existed, but Kreeck Mendez (the attorney with whom the conflict supposedly existed) filed an affidavit with the trial court adequately explaining that no conflict existed (R. 168-73; 325 at 48, 52, 55). At that point, even the State agreed that there was no need to disqualify LDA (R. 331 at 17-19). It is certain that the prosecutor failed to show in open court that a conflict existed, and the State is still unable to show that a conflict existed that required the trial court to advise LDA to withdraw its representation. Therefore, the trial court erred in continuing the trial date further and the State failed to have the case tried within the allotted time period.

3. The Lengthy, Additional 77 Day Delay Was Not Supported By Good Cause.

Concerning the further continuance from October 4 until December 19, 2001, the State asserts it was acceptable for the trial court to continue the trial an additional 77 days, even though it had almost been one full year since Scuderi filed his 120-day

disposition, without showing on the record why such another lengthy delay was necessary (Br. of Appellee at 24-25).

The State's reliance on *State v. Houston*, 2003 UT App 416, 82 P.3d 219, is misplaced. In Houston, defense counsel stated he was unavailable for trial the week of April 1st, and the trial court stated it was unavailable the weeks of April 8th and 15th. *Id.* at ¶ 12. The 120-day disposition period was to end on April 13. *Id.* at ¶ 10, n.2. After some discussion, the trial court set the trial date for April 24, just 11 days outside of the 120-day period. *Id.* at ¶ 12. The trial court recognized this delay, but stated on the record:

> Let's set this for April 24, 25[,] and 26. And the record will reflect that [the beginning date] is past the 120-day [period]. The [c]ourt knows that as we are doing it and [that] it's past the 30 days for the expert-witness notice. But it is the soonest I can set it on the calendar, *given that the defense counsel is not going to be here the first week of April* and the [weeks of the] 8th and 15th are master calendars for the [c]ourt.

Id. (emphasis in original). This Court found that this brief 11 day delay, attributable in part to defense counsel's absence and the trial court's unavailability discussed in the record constituted "good cause". *Id.* at ¶¶ 13-14.

Relying on *Houston*, the State incorrectly asserts that whenever defense counsel causes even a minor delay due to his schedule, "the resultant delay is not attributable to the State" even though the trial court fails to explain in "open court" why no earlier date is available for trial (Br. of Appellee at 24-25).

Houston is not analogous to the facts of this case and does not stand for the proposition the State asserts. At the scheduling hearing on October 4, 2001, the trial

court stated only that two dates were available: one in November and the other December 19 (R. 363 at 3). Trial counsel said she had a conflict with the November date but not the December date (R. 363 at 3). Unlike *Houston*, the State failed to bring up the 120-day disposition and the trial court failed to consider in "open court" the 120-day disposition. The trial court made no mention of the fact that either date fell outside of the allotted 120-day period, nor did it discuss in "open court" why no earlier date was available. Thus, the State's interpretation of *Houston* is incorrect.

The mere fact that trial counsel had a conflict on the November date does not mean that the trial should have and could have been scheduled earlier. Trial counsel was ready for trial as early as October 4 (R. 363 at 3). It cannot be argued in good faith that the additional 77 day delay is entirely attributable solely to Scuderi because his trial counsel had a conflict with some date in November. *See Coleman*, 2001 UT App 281at ¶ 6 (any delay must be "a relatively short delay"). The State failed to call to the trial court's attention that the trial should be scheduled as early as possible, considering the fact that the 120-day disposition was filed November 7, 2000, almost one full year earlier. This failure to ensure that the case be brought to trial within the 120-day period requires a dismissal of the convictions with prejudice.

4. The Next 92 Day Delay Did Dot Constitute Good Cause Shown in Open Court.

The State's last argument regarding the 120-day disposition is that the final 92 day delay from December 19, 2001 to March 20, 2002 was reasonable (Br. of Appellee at 26-

27). However, the State once again fails to demonstrate that "good cause" shown in "open court" justified such a lengthy delay.

The State claims it was reasonable not to schedule a two-day trial during the 2002 Winter Olympics (Br. of Appellee at 28). While it may not have been "practicable" to schedule this two-day event during the Olympics, the trial court failed to explain why the trial could not be scheduled before the Olympics. The State expressed that it would be ready for trial the second week of January 2002 (R. 356 at 5). However, the trial court, without giving any explanation in "open court," stated, "we can't go then, practically speaking" (R. 356 at 5). The Olympics did not begin until February 8, 2002, a month later than the State said it would be ready to start (Br. of Appellee, Addendum B). The State's assertion that the trial court's explanation, "we can't go then, practically speaking," is a sufficient explanation "on the record why trial could not be held earlier than March 20th" is not supported by the record (Br. of Appellee at 27-28). The trial court gave no explanation why it could not begin trial a month before the Olympics. It merely stated it could not do it. Thus, the State once again failed its "affirmative obligation to ensure that good cause" for such an prolonged continuance be shown in "open court." *See State v. Wagenman*, 2003 UT App 146, ¶ 15, 71 P.3d 184.

Finally, the State's assertion that the trial could not be held during the Olympics is not supported by the memorandum the State offers pursuant to Rule 201 of the Utah Rules of Evidence (Br. of Appellee at 29, n.5). That memorandum clearly states that the trial court is only "encourage[d] to avoid jury and criminal trials" and further acknowledges that "some hearings and their time frames are mandated by law" (Br. of

Appellee, Addendum B). Scuderi asserts that the 120-day disposition required this matter be heard within that time period, and considering the already lengthy delay caused by the State in bringing this case to trial, the Olympics did not constitute "good cause" to justify the delay of an additional 92 days.

Therefore, the State failed to comply with its statutory mandate to ensure that this case was brought to trial within 120 days, absent "good cause" shown in "open court." Accordingly, this Court should dismiss his convictions with prejudice.

C. In the alternative that this issue was not preserved, trial counsel was ineffective.

There can be no argument that if the State failed in its duty to bring the case to trial within the 120-day disposition period, then Scuderi's trial counsel was ineffective for failing to file a motion to dismiss.

Moreover, the State's assertion that Scuderi's trial counsel was not ineffective for failing to file a motion to dismiss because defendants are entitled only to "reasonably effective assistance" and "not perfect advocacy" is comical. (Br. of Appellee at 15, n.4). Without question, if counsel fails to file a motion to dismiss—which should have been granted--based on a violation of the 120-day disposition, after the defendant has repeatedly requested counsel to do so, such incompetence is ineffective assistance of counsel if the disposition period has expired.

II. THE POLICE ACTED IN BAD FAITH BY DESTROYING POTENTIALLY EXCUPLATORY EVIDENCE

The State first contends that Scuderi asserts that this issue should be reviewed *de novo* (Br. of Appellee at 33). This is not entirely correct. This Court in *State v. Holden*, 964 P.2d 318, *cert. denied* 922 P.2d 88 (Utah 1998), underscored the necessity of carefully reviewing a trial court's determination of police misconduct. This Court ultimately determined that this issue is reviewed for abuse of discretion. *Id.* at 324. Because the trial court in this case failed to make any factual findings regarding the police misconduct, Scuderi reminds the Court of the necessity of carefully reviewing all the facts relating to the destruction of the evidence before Scuderi had the opportunity to examine it. In fact, this is exactly what *Holden* requires.

The State further contends that because the trial court failed to issue any findings of fact regarding the bad faith of the police, this Court should "resolve[] any factual discrepancies in favor" of the trial court (Br. of Appellee at 34). Scuderi asserts this position is inherently unfair and against the policy of encouraging a complete record for appeal purposes. It is apparent that the trial court found that the police did not act in bad faith; otherwise it would have been bound to rule in Scuderi's favor regarding his motion to dismiss. But to abandon a careful review of the evidence because the trial court failed to closely examine the facts or failed to place the findings of fact on the record would only encourage trial courts to not place any findings of fact on the record since this would essentially preclude a reversal on appeal. Scuderi asserts only that this Court should

carefully look at all the evidence and then determine whether the trial court abused its discretion.

The State next contends that Scuderi failed to preserve an adequate record for this issue on appeal and because the trial court failed to make any findings on the record, this Court must assume that the officers examined all or most of the items for fingerprints and did not find any (Br. of Appellee at 35-36). The State's position is illogical, to say the least.

It is unnecessary for the record to obtain "Attachment A" and "Attachment B" for this Court to properly find that only two items taken from the garage were tested for fingerprints. In the State's response to Scuderi's motion to dismiss, the State confirmed the fact that only two items were tested for fingerprints by not disputing Scuderi's allegation (R. 149). Moreover, during the motion to dismiss hearing, Scuderi asserted that only two items were tested for fingerprints and the State presented no evidence or testimony contradicting that claim (R. 325 at 32, 41). Therefore, it is illogical to assert that the trial court found that all or most of the items were fingerprinted when all of the evidence pointed to the fact that only two items were fingerprinted and then everything was destroyed before Scuderi had a chance to test the items himself.

The State's next assertion that the officers did not act in bad faith by destroying all the evidence because they acted pursuant to policy is not dispositive on this issue (Br. of Appellee at 37-38). Just because police are following procedure does not mean that Scuderi's rights were violated. There have been numerous instances where officers were following standard police procedures and later courts have held that conduct in violation

of the Bill of Rights. For example, in *Miranda v Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court determined that standard police interrogation tactics. outlined in a variety of police manuals that advocated the use of physical and psychological coercion, violated a suspect's fundamental rights. *Id.* at 446-448, 498-99.

Instead of immediately destroying all the evidence, the police should have standard procedures implemented that allows exculpatory evidence to be preserved, at least until the exculpatory value can be determined.

Accordingly, even if the police were following policy, Scuderi's rights were still violated because the police destroyed all the physical evidence without giving Scuderi the opportunity to have the items tested. By testing only two items and then destroying all the items without further testing, the police indicated by their own conduct that this evidence could form the basis for exonerating Scuderi. Therefore, the police acted in bad faith by destroying all the physical evidence.

And while it may be true that by destroying the evidence, the officers also destroyed any potential inculpatory evidence (See Br. of Appellee at 38), this choice was made solely by the officers after already testing two items and finding no link to Scuderi. Scuderi had no say in the decision and should not bear the burden of the officers' actions.

III. SCUDERI WAS PREJUDICED BY TRIAL COUNSEL'S INEFFECITVENESS

Under the totality of the circumstances, and considering the Prosecutor's purposeful elicitation of the fact that Scuderi was in prison, the outcome of the trial would have been different but for trial counsel's deficient performance.

The State asserts that the numerous references to Scuderi's prison history were "harmless because the jury's guilty verdict was strongly supported by the record by independent evidence" (Br. of Appellee at 43). However, these references to Scuderi's incarceration violated right to a fair trial and to a presumption of innocence.

The only evidence clearly linking Scuderi to the crime was the testimony of Felice Mahoney. There was little, if any physical evidence linking Scuderi to the crime of intending to operate a clandestine laboratory. However, several witnesses contradicted Mahoney's testimony. Thus, the main issue before the jury was the credibility of Mahoney versus the credibility of Scuderi and several witnesses in his behalf. The repeated references to Scuderi's history of incarceration impermissibly impressed upon the minds of the jurors that Scuderi must be a person of low moral character, and thus capable of committing the crime charged. This tainted Scuderi's character, causing the jury to believe Mahoney's testimony over that of other witnesses contradicting her testimony. Therefore, these inappropriate references to Scuderi's incarceration violated his rights and there is a reasonable probability that but for these references, the jury would have acquitted Scuderi.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons and the reasons stated in the original brief, Scuderi asks this Court to reverse his conviction.

RESPECTFULLY SUBMITTED this 25th day of August, 2004.

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CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 25th day of August, 2004.